

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
BALIGA, : Docket #18cv11642
Plaintiff, :
- against - :
LINK MOTION INC., et al., :
Defendants. : New York, New York
: May 24, 2023

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PROCEEDINGS BEFORE
THE HONORABLE VALERIE FIGUEREDO
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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THE CLERK: Judge, this is the matter of Baliga versus Link Motion Inc., case number 18cv11642.

Counsel, please note your appearance for the record starting with the plaintiff.

MS. MIRIAM G. BAHCALL: Yes, your Honor, Miriam Bahcall on behalf of the plaintiff, Mr. Baliga.

HONORABLE VALERIE FIGUEREDO (THE COURT): Good morning, Ms. Bahcall.

MR. MICHAEL J. MALONEY: Good morning, your Honor. This is Michael James Maloney, with my partner Rosanne Felicello on behalf of defendants, Dr. Vincent Wenyong Shi, and on this motion, Link Motion Inc.

THE COURT: Good morning, Mr. Maloney and Ms. Felicello.

MS. ROSANNE FELICELLO: Good morning, your Honor.

THE COURT: So this is a bit of a different format for an oral argument. There's really one topic or question that I'd like the parties to just discuss with me. So you're all aware of the R & R and Judge Marrero's like limited, basically let's call it a remand, for purposes of just the state common law fraud claim. And I don't know if you recall, but in his Decision and Order at page 39 through 40 he specifically

1
2 says neither party had addressed the Affiliated Ute
3 presumption and how the presumption applies, and this is
4 -- I'm quoting what his language is -- "where the
5 securities allegations primarily focus on a failure to
6 disclose but the common law fraud claims targeting the
7 same misstatement and omissions are pled as ground in a
8 more direct theory of reliance."

9 So I know the parties briefed the issue of
10 what's required under the state common law fraud claim.
11 I think, you know, we've extensively reviewed the New
12 York state cases, and it seems pretty clear that you
13 need direct reliance for a state common law fraud claim.
14 In the state courts there's no Affiliated Ute
15 presumption. I think that aspect of it, you know, I
16 don't think we need to discuss today.

17 My focus really is I read Judge Marrero to be
18 saying you've got these federal securities loss claims
19 that for all intents and purposes the Court has already
20 issued an R & R that was predominately based on these
21 material omissions. The R & R was adopted by Judge
22 Marrero. He found that the claim was basically a
23 failure to disclose the related nature of that Tongfang
24 transaction, right? In the statement sending it back to
25 us for the common law fraud claim he seems to be talking

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about the common law fraud claims, the state ones, being grounded in a more direct theory of reliance. And so the reason I wanted to talk to the parties is if we are all working on the assumption that for a common law fraud claim you have to plead direct reliance; we're not looking at an Affiliated Ute presumption.

How does that work in the context of these allegations here? Because we have at right -- at any point anyone can feel free to chime in -- but we have, you know, the 33 total purchases, which Judge Marrero has already said only 13 are actionable, right? So that's also like not open for discussion. And there's only one -- so the Tongfang transaction is in March of 2017. Mr. Baliga makes the one purpose in January 19th of 2018. So that's one purchase after the Tongfang transaction but before the Seeking Alpha report in February of 2018. And then after February of 2018, as you know, he makes several purchases from June through August of 2018.

So I guess in a nutshell -- I know I have been talking for a while -- but I want to hear the parties out based on the allegations in the Complaint, you know, for this common law fraud claim where we have to show direct reliance, has Mr. Baliga made out enough. And is

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there some disconnect with saying -- this was more
fundamentally my question -- is there some disconnect
with saying that his federal securities law claims are
based on this theory of a material omission; whereas,
his state law, state common law fraud claim, is there a
disconnect if we potentially say that's grounded more in
a direct theory of reliance, i.e., a direct -- he relied
on a misrepresentation?

MS. BAHCALL: May I respond first --

THE COURT: Yes. And, as I said --

MS. BAHCALL: -- since I think it's kind of
directed at the plaintiff?

THE COURT: -- I'm obviously happy to hear from
anyone. And, you know, this was really -- I know we're
in this setting, but I was hoping to have, you know, an
open discussion about this.

MS. BAHCALL: Okay, so I think, yes, I think we
can state and have state a claim. And we do base
reliance, and under New York state law you can base
reliance on an omissions claim or a mixed claim. And we
think we've done that. And the fact -- it doesn't
become -- we're not saying it's a misrepresentation case
for the common law fraud claims and it's an omissions
case for the securities law claims. It's the same case.

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2 The reason we made it clear -- and I think when we
3 appeared here the last time -- and I reviewed the oral
4 argument -- I'm pretty sure I said we are looking at
5 reliance on three bases, I said -- and it's true, and
6 they're compliant. I mean, it wasn't just something.
7 It was one, we thought we were entitled to fraud on the
8 market for the misreps, for the securities law claim
9 misreps; we thought we were entitled to Affiliated Ute
0 because the securities law claims were predominantly
1 (indiscernible). And then we did say we also had direct
2 reliance under misreps and the omissions, and we did
3 plead that for common law fraud claim, as well and for
4 negligent misrep. And the judge has already found
5 there's no difference in reasonable reliance for
6 negligent misrep and common law fraud. And in the
7 negligent misrep claim you found reliance was adequately
8 pled, and the Court adopted it, and they didn't object.

9 So I think we have -- and we are claiming it is
0 a misrepresentation but mainly an omissions claim, and
1 we're relying on it. And your Court's recognized you
2 can rely on an omission; you have to plead direct
3 reliance, which we've done. And the way it works is --
4 and Mr. Maloney at the last argument, in fact, admitted
5 he understood it from our pleadings. And, after all,

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that's what Rule 9(b) is about, that we're saying that Mr. Baliga, which we can do here -- I mean, a lot of the cases go off, and whether you need the presumption, mainly because they're a class action on these certifications, and to have one person did, one person didn't, it's hard to show the whole class read everything. But he understands that -- when I say "he," I mean she, based on the argument -- we pled that he relied on the statements that came up. He read them; he relied on them.

THE COURT: So just to be more specific, because I -- and I have your Second Amended Complaint here -- as I reviewed the Complaint, I thought you pled -- your allegations of direct reliance for purposes of the common law fraud claim, I found at Paragraph 119 and Paragraph 124.

MS. BAHCALL: Yeah, we had it in Paragraph -- but it was 119, 124, and also Paragraph 2 and 120. So at Paragraph 2: "Baliga has alleged that he relied on defendants' misstatements and omissions concerning the various corporate transactions entered into LKM." 1119: "Baliga specifically alleged that he relied on the material false and misleading statements and omissions alleged herein in reaching investment decisions."

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Paragraph 120: "Baliga purchased LKM securities between the time defendants misrepresented or failed to disclose material facts and the time the two facts were disclosed without knowledge of the misrepresented or omitted facts." So --

THE COURT: Sorry, that was Paragraph 120?

MS. BAHCALL: Yes, Second Amended Complaint. I have -- I may have taken it down wrong, but that's what I have.

THE COURT: So --

MS. BAHCALL: And 124.

THE COURT: Right. And so all of those, again, are -- they're general, right? You're saying he directly relied on the misreps or omissions; you're not giving me specific statements he relied on, you're not providing specific actions he took in reliance on those statements or on the fact that the company hadn't disclosed the related nature of the transaction. One could view those allegations as a bit boilerplate. And so I'm wondering if you have more specific allegations of direct reliance?

MS. BAHCALL: Well, I will say that the Court also found that we had, and in fact, Mr. Maloney admitted it, initial admission here, that we went

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through and we listed every single fact or disclosure that came out and what they said and what they were in. We gave a laundry list of them and then said he reviewed them. And I will say that, again, at the argument --

MS. BAHCALL: But are those -- I'm sorry to cut you off; I just want to make sure that I'm clear on exactly what you're pointing to -- when you talk about those laundry lists of statements, are those all during the -- so I guess near in time or some -- because we're talking about the more limited actionable trades, as Judge Marrero circumscribed them or whatever. We're really talking about some time period before that January 2018 purchase?

MS. BAHCALL: Yeah. We list all of them he relied on and the dates.

THE COURT: And where do you list that?

MS. BAHCALL: Let me find it for you. I have them listed out. Unfortunately, Ms. Soli was supposed to join me and had car trouble, and I told her to bring the Second Amended Complaint so I wasn't just working off of my outline. But I will find it for you.

THE COURT: Okay, sure. And I mean, as I said, like this is a bit of an unorthodox format, so if Mr. Maloney or Ms. Felicello want to chime in while

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you're looking for it, I'm happy to do a back-and-forth.

MR. MALONEY: Yes, your Honor. Thank you.

I'd like to address first your question about whether plaintiff has adequately alleged direct reliance here. I submit that the relevant cases before you are the *Doubleline vs. Odebrecht* case and the *In re Fire Festival* cases. You know, these cases both address a situation that is very similar to here where plaintiff alleges a laundry list of statements and then alleges that he or she relied on all of them generally in trying to make out at common law New York fraud claim. And the Courts both rejected that argument. The Courts are saying that the plaintiff, in order to make out a New York common law fraud claim must link each purchase with an identifiable statement. And that's direct actual reliance under New York law. And the Courts rejected these general laundry list allegations and boilerplate allegation of direct reliance on that laundry list. That's the correct legal principle here that should be applied, and that's one of the reasons why plaintiff has not been able to adequately allege direct reliance.

There's another point that is relevant and which these cases teach us. That is a failure to plead reliance under Rule 8. It does not satisfy even the

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minimal requirement of Rule 8, let alone the heightened pleading standard under Rule 9.

Both of those cases involved claims where common law fraud claims were brought also in parallel with the securities claims. You know, the *Doubleline* case, in particular, dealt with the presumption issue. Your Honor has already mentioned that; you don't an argument on that, so I won't go into that. But those are the relevant cases here.

There's another issue with reliance here, as well, another defect, we submit. Plaintiff's reliance must be justifiable. And that means basically that a reasonable person, you know, could have relied on the statements that they're claiming to have been fraudulent. And in this particular case, no transaction after February 18 could be justifiably -- could be based on the justifiable reliance on a misstatement here because that's the time when plaintiff himself alleges that the truth was disclosed.

THE COURT: But what about Shi's affirmative misrepresentations after the Seeking Alpha report? Why couldn't he justifiably rely on that?

MR. MALONEY: He hasn't alleged that. He's alleged, again, a laundry list. And he's failed to

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connect his purchases to an identifiable statement. And that fails the standard of Rule 8.

And then just to make a record here -- I apologize -- but I have the Second Amended Complaint in front of me, and my Paragraph 120 does not read as plaintiff's counsel read it. Paragraph 120 here talks about fraud on the market. I'm sure that's just a typo and there's another paragraph that counsel is referring to.

And then I know there are references to judicial admissions. I reject any judicial admissions.

MS. BAHCALL: Okay, can I quickly respond?

THE COURT: Sure.

MS. BAHCALL: So, first of all, in terms of -- and, again, I will try to find the Second Amended Complaint -- but the judicial admissions, what I'm talking about here is that in the argument he admitted that by Paragraph 21 means the plaintiff's saying I looked at the SEC filings, I looked at the press releases, etc.

He also said that the Complaint sets out -- this is transcript at 63 -- "in an organized fashion misrepresentations and omissions he believed to occur." And he said again where plaintiff's saying that he'd

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read these things and decided to invest. So he understood it. And that's what the pleading requirements are about.

In terms of connecting this list to his purchases, etc., I think, as we explained, I mean the overall admission here that was not cleared up till we filed, which is why the judge allowed and agreed that all the purchases after March 2017 were allowed even though, you know, we've heard that some of it came out, is because we relied on what was in the public, which was basically that it was an arm's length transaction. We didn't know she was on both sides; we didn't know she wasn't going to pay back the money, etc. That is material; it's an omission whether or not, you know, justifiable reliance, as the Court found and you found is an issue of fact. But that was out there. That's what we relied on, that omission.

And --

THE COURT: Can I just ask you: Isn't that what the -- the fact that she was on both sides of the transaction and it wasn't arm's length, isn't that what Seeking Alpha revealed in February of 2018?

MS. BAHCALL: But then -- I may have my -- but then what happened is the company put out a statement

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Shi again -- and we believe (indiscernible).

THE COURT: But then that's no longer -- why is that no longer -- that's no longer reliance on an omission; it's reliance on a direct misstatement by the company.

MS. BAHCALL: You could put it either way. The omission didn't get cleared up or it is another statement, and we said we relied on it.

THE COURT: But this -- and this is where I'd like to be more specific, because as I read the Complaint -- and, you know, I understood whatever arguments counsel might have made at the last hearing we had on the motion to dismiss -- I mean, you still need to plead under Rule 9, especially for a fraud claim there's a heightened pleading standard, so it still needs to be contained within the four corners of the Complaint. And so what I'm focused on is when you say that you pled reliance, other than these paragraphs that we've talked about, I think 124, 119, Paragraph 2, and potentially this might be misnumbered 120, those all talk about reliance generally in terms of the statement "we directly relied." But there's no concrete factual allegations to support that statement. So he doesn't go on to say, "I read the statement from Shi; it said this

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transaction was actually arm's length, and I relied on that in making my purchase on June 2018." There's nothing like that in the Complaint.

MS. BAHCALL: No, it doesn't tie -- you're right -- specific purchases other than saying we purchased all of these. He was buying over time based on the information out there. He didn't -- he claims that based on the information out there, which was the omission which remained and then the, as you said, whether you called it "misrep" or "omission," when Shi then went and tried to claim that Seeking Alpha was wrong, that that was the information that was out there, that he bought on it. But he was buying based on the information that was out there, which was basically that it was -- the transaction was arm's length, not that it never was disclosed by Shi that he was on both sides. So we don't tie it to specific purchases, you're correct. What we do say is there was a material misrep -- I mean a material omission out there, which the Court found -- you did. And we bought securities over time based on that, all the while it wasn't corrected. So they all fall within that period. And that is what, you know, we allege.

And because it is an omission, it's hard to

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allege a lot more specifics. We allege that -- and he understood, we reviewed these things, we understood this, and we bought.

MR. MALONEY: If I could --

MS. BAHCALL: Or we held. I mean, that's another thing. Common law fraud, unlike the securities laws -- and we do allege a holding claim, too -- but the fact is we bought and held our shares believing the information that was out there.

THE COURT: Mr. Maloney, I'm going to let you interject -- I just wanted to ask, because you had said it's an omission, it's hard to allege more, and I guess it's a two-part question, but is there any state law, New York state law case that you can point me to or federal case interpreting New York state law on this common law fraud claim that would say that's enough? Because -- and the reason I ask -- and then maybe this is the second part of my question -- I think the parties cite *Towne v. Kingsley*, which is also a common law fraud claim also based on an omission. I believe it was either the Third Department or it was one of the appellate divisions. And that case seems particularly helpful -- yes, it's a Third Department case -- I'm sorry -- particularly helpful because in the context of

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the omission there, the Court found that the plaintiff had -- and I understand that was after trial, but it was helpful to see what the Court would rely on for purposes of showing direct reliance in an omission case, right. And there the Court points to all these things that the plaintiff did on the assumption that this property hadn't been transferred and sold without his knowledge.

And I read that case as saying like these are the things you could allege to show direct reliance on the failure to disclose a material fact. But I don't -- and I'm happy to have you distinguish *Towne* or the like, but there's none of those allegations here or similar allegations.

MS. BAHCALL: See, now, we think there is, which is, I think, what we argued in our briefing. These --

THE COURT: And what are those allegations?

MS. BAHCALL: So, in *Towne* what they say and other New York cases dictate, the element of justifiable reliance is linked to whether the plaintiff has the means available to know by the exercise of ordinary intelligence the truth or real quality of the omission but failed to make this use. So -- and I think she attempted to distinguish *Towne* because it's, you know,

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based on the argument that there was no duty to disclose, which the Court found. But we did say and we did allege that it was material the Court found it; that it was Shi on both sides, that we read everything and we didn't know that Shi was on the other side. And that was in --

THE COURT: Why didn't the issue --

MS. BAHCALL: -- Shi's possession to know that.

THE COURT: Right. And I don't dispute that. But why doesn't that go to whether there's -- so, as I read New York state law on this, you both in an omission case -- right?

MS. BAHCALL: Yes.

THE COURT: An element of a common law fraud claim is you have to plead not only direct reliance but you have to plead a duty when we're talking about an omission. So why isn't the Court's statement about whether they had -- whether the plaintiff had the means available to know by the exercise of ordinary intelligence the truth or the real quality of the subject of the omission but fails to make use of those means, why is that not really the Court talking about the duty to disclose, which itself is like almost a separate or added element when you're talking about the

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common law fraud claim in the context of an omission?

MS. BAHCALL: And I agree with you. And I do think the Court found that there was a duty to disclose a related-party transaction.

THE COURT: But if you agree with me, then, the Court goes on after that and talks about, "Here the jury was provided extensive correspondence between the parties, including letters from defendant to plaintiff expressing defendant's interest in the subject property and a subsequent letter from plaintiff to defendant wherein plaintiff indicated that he was unwilling to transfer ownership of the subject property," this, of course, plaintiff thinking he still had ownership of the subject property. The jury also heard testimony from plaintiff that defendant never asserted that he was the sole owner of the subject property. Plaintiff averred that he did not think that defendant could transfer title of the property."

And then you also had a letter approximately 10 months after defendant executed the deed transferring the subject property in which plaintiff suggested that the parties sell the subject property and rent space to defendant when he continued to practice" -- these are all things that they introduced as evidence showing

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plaintiff's state of mind that showed his reliance on the fact that he thought he still owned the subject property, which was the omission, the fact that he didn't actually own it because defendant had sold it --

MS. BAHCALL: Right.

THE COURT: But this is all separate from the duty to disclose. This is all things that he pointed to that concretely showed direct reliance on the omission. And so that's what I was asking, like why does this case help you? Because it reads to me as if like the Court is saying you must show both a duty to disclose because we're talking about an omission and not a misstatement; and, in addition, you have to show direct reliance even in an omission case with actual factual allegations that support that.

MS. BAHCALL: See, how I read it -- and then, obviously, you know, I don't mean to sort of quibble, but at the pleading stage -- and, again, that was at --

THE COURT: At the trial.

MS. BAHCALL: -- trial. And the question I understood at trial was whether it was the justifiable reliance element as fraud is not satisfied where the plaintiff has the means available to know by the exercise of ordinary intelligence the truth or the real

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quality of the subject of the omission. And that's what the proof went to later on.

THE COURT: Well, doesn't that go -- so it's justifiable reliance. So doesn't the fact he relied, and then was it justifiable. And the fact that he couldn't have otherwise gotten the information on his own because it was knowledge exclusively within the defendant's possession, that goes to whether it was justifiable. But he still had allegations that supported reliance.

MS. BAHCALL: Right. The way I see it is the reliance -- and, again, this is where, you know, although they haven't -- and I was prepared to actually, before your introduction, talk about I do think the concept of Affiliated Ute, although not the --

THE COURT: I mean, I'm happy to go down that road, but I will say --

MS. BAHCALL: I know. I know. But my point is it's not that far off in an omissions case like this that at this point they sort of come together because, in order to plead reliance in an omission case like this with *Towne*, we have to plead that there was an omission, that there was a duty to disclose, and we have to say we justifiably relied on sort of the quality of the

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statement and the, you know, the fact in this case, I guess the omission which sort of took away from the quality. But when you then take the next step of whether it was justifiable there is other information out there, I believe that your Honor, and I think the Court as well adopted -- and I'll find it -- is that's an issue of fact. And --

THE COURT: Yes. And I don't dispute that.

MS. BAHCALL: -- so I think that goes -- those sort of facts we alleged reliance under this case, we alleged that it was justifiable. I mean, granted we say it's justifiable because do we have a debate in fact about why it's justifiable? That's an issue of fact for later on, which is what happened here. Clearly, it got past a motion to dismiss. And then it's at trial. So that's how I think this case absolutely helps us because I think we've shown there was a duty to disclose. I think it was in their possession. You know, whether or not they can show facts later on or something to suggest, you know, it wasn't justifiable because we could have found out, too, or something, I think that's for down the road.

That being said, this is the first time -- and, again, it was exception and negligent misrep that the

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issue of whether or not we have given enough facts to explain our justifiable reliance or reliance in the case of omission and common law fraud in New York law, I think we did say in our brief we would appreciate the opportunity to amend. And I know, and we're going to hear from him that, yes, we're on the Second Amended Complaint. However, when you go through it, the first Complaint, we were asked to amend to give purchase dates. So we amended specifically for purchase dates; otherwise, it was exactly the same. Issue not raised. So that was the First Amended Complaint. The Second Amended Complaint, the magistrate asked that counsel -- and not that it matters, but it was prior counsel to us -- counsel distinguish between the direct and the derivative claims. So that's how we got to the Second Amended Complaint. This issue is new; and if your Honor would like additional facts on this issue, we would request the opportunity to amend the common law fraud claim to address them.

THE COURT: Well, just so there's no ambiguity, it's not so much what I want. I guess, you know, given the cases I've indicated, why I thought *Towne* was somewhat distinguishable -- and I'm not trying to -- I don't want to confuse the issue -- I'm not trying to

1 PROCEEDING 25
2 reargue justifiable reliance, because as I said in that
3 prior R & R, whether it's justifiable question of fact,
4 I think there's -- it's pretty well established it
5 doesn't get thrown out on a motion to dismiss there --
6 but I'm talking about the direct reliance element, which
7 I think is different from whether the reliance was
8 justifiable. And that's where I see *Towne* as -- and
9 granted, it's after a jury trial, but I think it gives
10 you a flavor of potentially what you would have had to
11 have alleged to say he directly relied on the omission.
12 So something -- again, because we're talking about the
13 transaction -- it's not the whole 33 transactions; it's
14 starting with the January 2018. And really, if it's an
15 omission, you're really talking about just the one
16 purchase, right? Because in February 2018, arguably
17 everything gets disclosed; and then after that, you're
18 just talking about misrepresentations or, I'm sorry,
19 reliance on Shi's misrepresentation. But, in either
20 case, Mr. Maloney, I didn't give you a chance to chime
21 in.

22 MR. MALONEY: That's okay. You can finish.
23 I'm making notes.

24 THE COURT: No, no, go ahead.

25 MR. MALONEY: Okay. Thank you, your Honor. So

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I guess the first place to start here is with plaintiff's argument that Mr. Baliga was relying on everything that was in the public. That is the fraud on the market theory of reliance, which is a presumption permitted under the securities laws but not permissible under the New York common law. Saying that he is relying on everything in the public is saying the same thing as fraud on the market, just not using the words. And so, you know, we reject that argument for that reason.

New York law requires direct reliance, as we've established. And the cases we've cited do not make a distinction at the pleading stage between a claim that's based on an affirmative misstatement or a claim of omission, for example, the *Doubleline* case, the *International Fund Management* case that we cite. Those cases both involved allegations of fraudulent misstatements and fraudulent omissions. And there's no distinction about the standard of reliance, direct reliance required under New York law for those claims. So we do submit that plaintiff must link each misstatement/omission with an identifiable statement to meet the standard under New York law and Rule 8.

The *Townes* case we do believe is

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distinguishable for substantially the same reasons that your Honor has mentioned. The plaintiff in that case established at trial very specific facts demonstrating his direct reliance. And it's not for this Court to assume that he, you know, survived a motion to dismiss in that case based on allegations of general reliance because that's not in the decision. For all we know, the plaintiff in that case alleged all the specific acts in his Complaint in that case and survived a motion to dismiss for that reason.

Again, this all leads back to that standard that we see in *Doubleline, In Re Fire Festival*, where the plaintiff must link his purchases, his actions to identifiable misstatements and omissions. He had not done that here. He has, as your Honor noted earlier, asserted a laundry list of statements and then alleged general reliance on all of that information.

We recognize that justifiable reliance is an issue of fact. We do think that in certain cases it can be ruled on on a motion to dismiss. We do think this is one of those cases. And we do think actually plaintiff's allegations support that concept here. Right? He's implicitly alleging that he's relying on all the information in the public, which includes that

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February 2018 disclosure.

We also object to plaintiff's request for an opportunity to amend here. There's been two opportunities to amend. The first amendment was based on the lack of specificity, which is why plaintiff had to allege the transaction dates. Obviously, those transaction dates relates to the securities claim. They also relate to the common law fraud claim. Plaintiff had an adequate opportunity to allege direct reliance in that first amendment and elected not to. Obviously, the record shows the second amendment was primarily related to the question of direct versus derivative claims. It's, nonetheless, an opportunity to amend, and plaintiff declined to provide more allegations of direct reliance. We don't think any further opportunities to amend are appropriate here.

It is also worth noting that this case was filed in 2018. It's now 2013 -- 2023, and, you know, the pleading should be resolved at some point, and we don't think an opportunity to amend here is appropriate.

THE COURT: I've pretty much asked all my questions. If there's anything either side wants to add?

MR. MALONEY: Your Honor, I would like to just

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2 address one minor point. In the briefing, plaintiffs

3 complained that we did also touch on the issue of loss

4 causation. In our reading of the cases, the Courts do

5 consider, they tend to consider reliance on common law

6 fraud claims and loss causation together. We think

7 that's because the analyses overlap; you really can't

8 have one without the other. Reliance is a link in the

9 chain of causation. So in our reading of the cases,

10 they do tend to consider them together. We would submit

11 that the findings as to loss causation on the securities

12 claims do not directly translate to the common law fraud

13 claim because loss causation on securities necessarily

14 relies on the presumptions of reliance. And so, on the

15 securities claims the plaintiff need only show that, you

16 know, the fraud resulted in an economic loss; whereas,

17 in a common law claim a plaintiff must show a complete

18 chain of causation, which includes many of the elements

19 that were talked about in the *Townes* case where the

20 plaintiff had these interactions with the defendant and

21 relied on them and all those things were a link in the

22 chain of causation. I do understand that you want to

23 limit discussion, but I did want to point that out. And

24 I'll refer to our papers.

25 THE COURT: Well, let me ask you if -- it

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sounds like what you're saying is it's really almost the -- it's the flip of the same coin -- whatever the analogy is -- it's the same argument, right? Like, if he hasn't pled direct reliance, he's necessarily not going to be able to plead proximate causation.

MR. MALONEY: That's how we see it, your Honor, yes. The way we see loss causation is he must first plead facts showing that he read a statement, relied on it in making a purchase and then the purchase resulted in an economic loss. And that's how they overlap.

THE COURT: Right. And I think as I've indicated through my questioning, I agree that under state common law fraud, he has to plead direct reliance. We searched the case law extensively, and there just is no state case applying Affiliated Ute. And there's SDNY cases that say it doesn't apply. But I wonder if we don't -- you know, I guess depending on the outcome of the reliance, proximate causation might not even have to be reached, really, because it is really -- like, if there's no direct reliance, it's -- by extension, you're not going to get causation.

MR. MALONEY: We agree -- we agree with that analysis.

THE COURT: I'm happy to --

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MS. BAHCALL: All right, I would just like to say, one, I just want to correct, since we're correcting statements that were made. In the reply Shi represented that the judge had already determined that Baliga's allegations of reliance were sufficient only under the Affiliated Ute theory of reliance. And the judge didn't find that. The judge just recognized and said that -- your Honor found that defendants made material omissions but -- that Baliga relied upon in connection with investment decisions but only under -- you only reached the Affiliated Ute issue. He didn't make a determination. So I think it's an open question for the judge, where it was suggested it was closed.

And I'd like to close with again -- and I am going to cite a few New York cases -- that Mr. Baliga's allegations are more than sufficient to allow a reliance for a claim under New York common law. New York Courts have held -- and I'm citing again *Towne*, but there are other cases, as well -- that in the context of claims for omissions, the elements of justifiable reliance is inextricably linked to whether the plaintiff has the means available to know by the exercise of ordinary intelligence the truth or the real quality of the subject of the omissions but fails to make use of it.

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And the Court found that you were correct, that the error -- the crux of the alleged omissions in the statement of claims was the failure of LKM to disclose Shi's financial interests in the Tongfang transaction or the lack of any clear or direct affiliation between Tongfang, SPC and Tsinghua Tongfang.

And then the Court went on to hold that defendants had a duty to disclose regarding the transaction. And the Court also found that Shi's statements -- of omissions regarding the ability to pay were also actionable. So we believe on New York law we have alleged enough. However, if more detail is required on direct reliance, we are prepared to link it up. And we will say that we did not have the ability to know based on the information out there that Shi was on both sides.

THE COURT: But so this is, I think, maybe where -- and you should point me to any case you want me to look at that you think is helpful here. And we've already discussed *Towne* and why I think it's distinguishable --

MS. BAHCALL: Ad nauseam, I know.

THE COURT: No, no, it's all right. But, as I read the state cases and the federal cases that look at

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the state common law fraud, you know, you have the elements for a common law fraud claim. And if this were a misrepresentation case, you wouldn't even be looking at whether there was a duty to disclose, right? For a common law fraud you would just be looking -- so to state a common law fraud claim in New York, was there a misrepresentation or material omission made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury. Those are your basic elements, right?

MS. BAHCALL: Correct.

THE COURT: If we don't have an omission, we don't even look at a duty to disclose. You don't disagree with me there?

MS. BAHCALL: No.

THE COURT: Okay. So then let's talk about what happens to these elements in the context of an omission case. And that's where I think the case law is clear that in the omission case you have to have, in addition to these four, a duty to disclose. You don't disagree, right?

MS. BAHCALL: No.

THE COURT: Okay. So then -- and then,

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obviously, there's like the elements that you look at for whether there's a duty or not. And we can argue in this case, you know, it seems Shi was a chairman, board member. Arguably, there's a duty. There might be an issue about whether you've alleged circumstances that establish a duty for Link Motion. But at least as to Shi, I think there might be enough to say there's a duty, right?

MS. BAHCALL: Right. The Court found there was a duty --

THE COURT: Right.

MS. BAHCALL: -- because the securities laws require you to disclose related-party transactions when you disclose a transaction.

THE COURT: Right. So -- but now -- but we still have -- again, going back to the fundamental elements of a common law fraud claim, you still have to show justifiable reliance of the other party on the, in this case, omission, plus a duty to disclose. And I think *Towne* makes clear that whether we have a duty to disclose and justifiable reliance are separate and it's not enough to just say there's a duty to disclose and that by extension establishes your factual allegations for justifiable reliance. But I'll point you also

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there's an SDNY case that looks at the common law fraud claim. It's 904 Tower Apartment, which I think you said --

MS. BAHCALL: Yes, I have that, too.

THE COURT: Yes, and so, again, this is another instance where I think if we are examining with the understanding that we've got the four elements for a reliance claim plus duty to disclose in the context of an omission, you've got this case where there's allegations that go directly to justifiable reliance that are separate from the duty to disclose. And those are the fact that the plaintiff stopped looking for alternative living arrangements, performed their other obligations under the purchase agreement, hired a consultant to help perform pre-closing inspection. This was the -- they were trying to purchase an apartment and there was -- it was a material omission case. And there's allegations that the plaintiff took specific actions, being stopped looking for alternative living arrangements, hired this consultant, in reliance on the fact the defendants had not disclosed the existence of these financing agreements, the financing and loans that would affect the value of the apartment. So they thought they were purchasing apartments with a certain

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value; defendants didn't disclose a material fact, which is these financing arrangements that would have like changed the value of the property they were purchasing. And thinking that the property was still valued at X, they took these actions, namely, they didn't look for other living arrangements, they hired a consultant. They were going forward with the act of purchasing the property.

And that's what -- when you say you would amend -- but that's different than whether there's a duty to disclose. Those are specific actions --

MS. BAHCALL: No, agree.

THE COURT: Right. So when you were talking just now, you were saying in the -- you've alleged that Mr. Baliga couldn't have known, he didn't have this information, it was -- there's no question that, you know, those allegations all go to whether there's a duty to disclose. But are you going to be able to plead allegations that show Mr. Baliga relied on the fact that he didn't have the omission -- that he didn't have this information, apart from the facts that show there was a duty? Does that make sense?

MS. BAHCALL: No, it makes absolute sense. And I think we have and we will, we could give more detail.

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But what I was going to is the tests they seem to use in those cases, the two cases we talked about, the New York law cases, is an omissions case. What we have to be able to allege -- and I believe we did, but we would certainly allege it with more specificity if given the chance, is that -- and this goes to justifiable reliance -- that we didn't have -- it was exclusively in their control. They needed to disclose it because we couldn't know.

THE COURT: And you've already alleged all that. And I think --

MS. BAHCALL: And that's what we're saying is the main thing is required.

THE COURT: But that -- okay, so let's -- and, you know, I think those allegations for his inability to find out are there. And as I was trying to indicate, I think they go to whether there was a duty to disclose in the first instance. I'm wondering what specifically you can point to, actions that Baliga took that would show he relied on the fact that he thought this Tongfang transaction was arm's length, was good for the company, was not some way to like take FL Mobil and ShowSelf and like squander the value for the company, etc., whatever you want to describe the transaction as.

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MS. BAHCALL: I got it. So, respectfully, I read that as not whether there's a duty. I think the duty arises as law, etc. It's whether or not we've pled justifiable reliance, that we relied because we couldn't know and they knew. The duty comes, as the judge found, out of the law and also if you give a half-truth, you have to tell the rest of the truth. Right? So that's where that comes.

In terms of whether we've relied -- you know, in this case they said, well, what he did in reliance. Well, what we've alleged Mr. Baliga did in reliance. And, again, we could be more specific about it. But clearly, you know, she understood from our pleadings too what we allege is he bought and held shares based on the report that they were going to do an arm's length sale and it was good for the company and etc., etc., and that they were going to pay the money. We bought shares, we held shares, so we didn't sell shares --

THE COURT: Well, you only bought -- if we're just talking about you bought shares in reliance on the Tongfang transaction being solid, you only have the one, the January 2018, right?

MS. BAHCALL: Well, see, I would say you could do it either as a misrepresentation or omission. We

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2 continue to believe it and we will allege it with more
3 specificity because what we would be able to show is
4 that Mr. Baliga in fact had meetings with Shi's
5 representatives, when this information started to come
6 out, where he was told, "No, it's not true." And so he
7 continued to believe that it was arm's length based on
8 the information he was given. And then they continued
9 to publicly defend, and privately they were sending out
10 emails to investors defending it. So he continued to
11 believe it was arm's length, so he continued to do his
12 regular activity of buying shares over time. And even,
13 by the way, you buy shares at the price. So the fact
14 that you may buy it after some of the information is out
15 doesn't mean you didn't rely; it meant that you wouldn't
16 have ever paid that price had you known that it was on
17 both sides.

18 So we do believe we've alleged he did take
19 actions based on it. He bought shares, he continued to
20 hold share, which unlike the securities laws, under
21 common law fraud we've alleged holding is an action,
22 too. So I think it goes beyond the one purchase; it
23 goes throughout that time period, whether you're calling
24 it an omission or misrepresentation. That's what we
25 did. I mean, it's not like it's super-complicated where

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in some things you kept changing your position and doing other things. We bought shares, we continued to hold shares, we didn't sell shares, we bought more shares, we --

THE COURT: Do you have any statements in the Complaint that say that, for instance, "I continued to hold or didn't sell," that link -- specifically, Mr. Baliga continued to hold the shares or didn't sell shares because he believed Shi's statement that this was an arm's-length transaction?

MS. BAHCALL: In general sense, yes. If you're asking with -- you're right; we don't say with respect to this purchase we bought it, continuing to believe this. We say over this time period he bought and continued to hold share believing what was out there, that, you know, it was an arm's-length transaction. That is what we say. We do not link up each one and continue to say it each time.

THE COURT: And why is that sufficient to meet the specificity requirement for a fraud claim?

MS. BAHCALL: Well, I would say, and particularly in this case, because we listed that these other things he -- it didn't really change that much. The information was continuing -- was out there in terms

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2 of it being arm's length and not corrected or defended;
3 that saying it all together, I think is probably
4 adequate because, clearly, the purpose of Rule 9(b)
5 where it says you have to do it with specificity is so
6 that the defendant knows what he's being charged with.
7 And clearly the defendant here knows it. That being
8 said, we can separate it out by transaction. We're
9 going to say a lot of the same things because it
10 remained the same throughout the time period. He
11 continued to believe, based on the information out there
12 when he bought these shares, that it was an arm's-length
13 transaction. He continued to believe it. He continued
14 when he heard this, this came out, he heard this from
15 Shi. So he continued to believe it. But we are
16 prepared to provide that detail.

17 THE COURT: And --

18 MS. BAHCALL: And nothing will be surprise to
19 him. So there's no prejudice. He understands the case.

20 THE COURT: And you indicated you had other
21 communications beyond just the Shi public statement;
22 there were emails to shareholders?

23 MS. BAHCALL: That we can show a direct
24 reliance on, yes.

25 THE COURT: Mr. Maloney, is there anything you

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want to add?

MR. MALONEY: Yes. Yes, your Honor. On the issue of the duty to disclose in an omissions case, I think, you know, this duty issue is obscuring the real question on the reliance element of the common law fraud claim. You know, like plaintiff's counsel said, you know, the real issue here is when you state the rule is when you state a half-truth, you must tell the full truth. That's really what's going on here. And in this particular case, plaintiff has alleged a laundry list of what they claim to be half-truths because, you know, this information that they allege was omitted from each of those laundry lists of statements. And that's the fundamental flaw with their common law fraud allegations. They must still link up their actions of reliance with the particular half-truths that they're alleging in the Complaint. And they have not done that here. That's not only a Rule 9 deficiency, it's a Rule 8 deficiency under *Doubleline* and *In Re Fire Festival*.

I'm not aware what specifically plaintiff is referring to about emails to investors, but, you know, emails to the investors are not all that different from, you know, public press releases. So that's simply another example of what plaintiff is alleging to be out

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there in the public that he relied on generally and not identifiably. So that also would not satisfy the requirements of Rule 8 as taught in the *Doubleline* and *In Re Fire Festival* cases.

THE COURT: So, wait, if he had specifically alleged -- so prior to his June 2018 purchases -- this is after Seeking Alpha comes out and after Shi makes his first, his statement defending the Tongfang transaction, if he says, you know, I read Shi's statement and then had other communications from Shi to investors explaining that the Seeking Alpha report for whatever reason doesn't have the transaction adequately described, I believed the company and still believe that the Tongfang transaction was arm's length and then he continues to buy, you don't think that's enough for reliance?

MR. MALONEY: No. No, your Honor. That --

THE COURT: And why is that?

MR. MALONEY: -- goes back -- I'm sorry.

THE COURT: No, no, why is that?

MR. MALONEY: That goes back to this essentially fraud on the market theory. Right? This is a reliance on all the information in the market in general. Right? He's talking about the February 2018

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Seeking Alpha disclosure, he's talking about the prior disclosures, and he's talking about Dr. Shi's disclosure, all of them together, in general.

THE COURT: But he's tying it -- he's -- he's an investor, he's looking at the publicly released statements of the company, and he's tying it to specific actions he took -- because there are specific transactions.

MR. MALONEY: Well, first, to be clear, he hasn't alleged that in the Complaint.

THE COURT: No, no. Yes, this is --

MR. MALONEY: Right? This is all hypothetical?

THE COURT: -- a hypothetical.

MR. MALONEY: Right. But at the end of the day, you know, he still has knowledge of that February 2018 disclosure.

THE COURT: So what does he need, then, in your -- in this hypothetical, what does he need to prove -- what does he need to allege direct reliance?

MR. MALONEY: To allege direct reliance in this case, he would have to link each purchase with a particular half-truth, as plaintiff's counsel describes it, alleged in the Complaint.

THE COURT: So why isn't that linking up the

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June 29, 2018, purchase with the half-truths or the misrepresentations from Shi?

MR. MALONEY: Because he still has knowledge of those prior disclosures. He can't -- you know, this does overlap with justifiable reliance in a way, right? He has knowledge of the February 2018 disclosure. Then he reads these other statements. Right? And there were other public disclosures that were relevant, as well, also from Seeking Alpha that, you know, tend to go in Shi's favor. So --

THE COURT: But why doesn't that go to whether his reliance was justifiable, which again I think, given even this hypothetical, it sounds like that's a factual issue? But that, to me, would be different whether he's -- different from him having said, "I heard these statements from Seeking Alpha and Shi. I believed Shi. And because I believed that he was telling me the truth, I bought these shares"; why is that not sufficient for direct reliance? It may not be justifiable, and that might be an issue you then litigate.

MR. MALONEY: The other -- so I think probably the best way to illustrate this is to go back to *In Re Fire Festival*. The Court there, you know, talked about the who, what, where, when and how. Right? And there's

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a time element here. None of plaintiff's purchases line up with these disclosures. He can't link the purchases to the disclosures. He wasn't considering the disclosures when he made the purchases. We know from plaintiff's briefing that what was really going on is he would just buy when he had cash available. He wasn't considering the disclosures that he received from these various sources alleged in the Complaint, thinking about them and then deciding to make a purchase that evening.

THE COURT: So you're basically saying there has to be a tighter temporal connection --

MR. MALONEY: Yes.

THE COURT: -- between the -- and just remind me when was Shi's misrepresentation -- or the alleged misrepresentation?

MR. MALONEY: One moment?

MS. BAHCALL: March of 2017.

THE COURT: Well, March 2017 is Tongfang.

MS. BAHCALL: Oh, in 2018.

THE COURT: March 2018? So you're saying between March 2018 and June 29th of 2018, there's too big of a temporal gap?

MR. MALONEY: Yes, your Honor, yes.

THE COURT: Okay. Is there anything else from

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either side?

MR. MALONEY: I think I've said for everything I've hoped to say. Thank you.

MS. BAHCALL: And I would only -- I would say the same. The only thing I would say is to Mr. Maloney's points, one, I don't think there's anything in the law that says you have to buy within a week or a month. The information is out there, it's not corrected, he buys. And in fact, he splits it up because he -- he thinks it's still a good buy based on the information out there. I don't think that that takes away.

And I think that direct reliance, the information we would provide in the Amended Complaint, that you have an email from Shi after this comes out refuting it. I think that is what direct reliance is, where a lot of these fraud in the market and stuff are to everybody. This is to Baliga. And I think that is the quintessential direct communication he relied on, etc.

THE COURT: And on the temporal issue, you think it would be sufficient even if the email was sent several months before the purchase?

MS. BAHCALL: Well, what I'm saying is the

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2 email that I'm talking about is around the time -- after
3 the disclosure in Seeking Alpha, there was communication
4 saying, you know, showing him that it was in -- again
5 denying the allegations of seeking Alpha, saying it was
6 arm's length, etc. And he truly believed it continued,
7 that it was arm's length.

8 THE COURT: Well, this was super-helpful. I
9 appreciate everyone taking their time. And, you know, I
10 think we'll get a decision out relatively soon. If
11 there's nothing else from either side?

12 MR. MALONEY: No, your Honor.

13 MS. BAHCALL: Thank you for the opportunity.

14 THE COURT: Thank you so much. Yes, no, thank
15 you so much.

16 (Whereupon the matter is adjourned.)

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C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Baliga versus Link Motion Inc., et al., Docket #18cv11642, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: May 31, 2023